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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 48

CARL STILL, *Petitioner*

v.

NORFOLK AND WESTERN RAILWAY COMPANY, *Respondent*

On Writ of Certiorari to the Supreme Court of Appeals of the State of West Virginia

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BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The judgment of the Circuit Court of Mercer County, West Virginia is unreported. However, the judgment is printed at page 19 of the Record. The Court's opinion appears at page 465 of the Record.

The judgment of the Supreme Court of Appeals of West Virginia is also unreported. The Order refusing to grant petitioner a writ of error and supersedeas to

the judgment of the Circuit Court of Mercer County, West Virginia appears on page 510 of the Record. The refusal to grant the writ of error and supersedeas was unanimous. Under the rules of the Supreme Court of Appeals of West Virginia, had any judge voted in favor of granting the writ of error and supersedeas, this would have appeared in the order of refusal.

QUESTION PRESENTED

1. Did the trial court err in directing a verdict in favor of respondent where the evidence showed without substantial conflict that petitioner willfully, intentionally and fraudulently misrepresented his true physical condition; that, if such misrepresentation had not been made, respondent would not have hired petitioner; that respondent's medical examiners were, in fact, mislead by the misrepresentations without dereliction on their part; and that there was a direct casual connection between the false representation and the injuries alleged to have been sustained.

INACCURACIES AND OMISSIONS IN PETITIONER'S STATEMENT

The petitioner's statement contains many inaccuracies, and omits much that is necessary for a proper understanding of the case. We will, in our Statement of Facts, correct these inaccuracies and supply the omissons.

KIND OF ACTION AND PROCEEDINGS IN TRIAL COURT

This is an action instituted by petitioner against respondent under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, to recover for personal injuries alleged to have been sustained by petitioner

in respondent's west railroad yard at Bluefield, West Virginia, on January 23, 1958, when an empty coal car on which petitioner was riding, while engaged in a switching operation, was coupled to by a following train of sixty-nine empty coal cars. In petitioner's Amended Declaration (R.10), it was alleged that petitioner was "knocked off of the car upon which he was riding" and that petitioner "sustained a permanent and severe spondylolisthesis due to the dislocation of his spine from the sacrum"; that as a result of said accident several vertebrae in petitioner's back "were broken, crushed and dislocated" (R.11).

At a pre-trial conference held in this action on August 10, 1959, petitioner's attorneys stated that *prior* to January 23, 1958, petitioner had had no back injuries or back disabilities, and "had never been to a doctor" (R. 42-3).

At the trial respondent pleaded the general issue and filed its Special Plea No. 1, and its Amended Special Plea No. 1, which Pleas alleged in substance that in petitioner's written Application for Employment with respondent dated July 24, 1951, and in response to questions propounded to petitioner by respondent's medical examiner at that time, petitioner had made certain false and fraudulent answers with respect to his health and physical condition, his previous accidents, injuries and illnesses, and his past military service, and medical discharge therefrom.

The said Special Pleas filed by respondent further alleged that for many years prior to his employment by respondent in July 1951, petitioner had suffered with a severe spondylolisthesis; that petitioner had been discharged from the United States Army on January 31, 1946, by reason of said spondylolisthesis—a

medical discharge—and had received a pension for such disability from the United States Government for a period of approximately three years; that petitioner had suffered with rheumatism which caused serious disability of his back, and had been involved in an automobile accident in which he had injured his back, and which had disabled him.

Respondent contended at the trial, and proved conclusively, that the low back condition known as spondylolisthesis, which petitioner had while in the United States Army in 1945 and 1946, and for which he was discharged, and for which he received a pension, was exactly the same condition which petitioner had immediately following his alleged accident, and at the time of the trial, and which petitioner sought to attribute to the alleged accident of January 23, 1958.

Petitioner objected to the filing of respondent's Special Plea No. 1, and Amended Special Plea No. 1, but the Court overruled said objections and permitted said Special Pleas to be filed.

Thereupon the case was tried before a jury and when all of the evidence had been introduced, respondent moved the Court to direct the jury to find a verdict in favor of respondent, on the ground and for the reason that petitioner's employment with respondent had been procured by fraudulent representations with respect to petitioner's health, physical condition, prior illnesses and accidents, prior Army Service and medical discharge, and that such fraudulent representations had a direct causal connection with the injuries alleged to have been sustained by petitioner.

The Court sustained respondent's motion, and the Court's opinion appears on pages 465-73 of the Record. In the course of its opinion the Court said: "I can't

imagine a stronger case of direct causal connection between the misrepresentations and the injuries complained of than we have in this particular case * * *".

STATEMENT OF FACTS

1. PETITIONER'S EMPLOYMENT BY RESPONDENT, AND HIS ALLEGED INJURY OF JANUARY 23, 1958.

Petitioner was employed by respondent as a yard brakeman on July 24, 1951, after having filled out, *unassisted*, and signed, a written Application for Employment (R. 371-2, 224-8), and having been examined by respondent's medical examiner. During this examinaton the medical examiner asked petitioner certain questions pertaining to his previous military service, medical discharge, illnesses, injuries, etc., and wrote down petitioner's answers on a card furnished for that purpose, and the card was signed by petitioner. This card was admitted in evidence as Defendant's Exhibit No. 5 (R.249, 483). The Application for Employment referred to was admitted in evidence as Defendant's Exhibit No 4 (R.225, 480).

Petitioner continued working for respondent as a yard brakeman until January 23, 1958, the date of his alleged injuries, except during the period October 1956 to November 18, 1957. In October 1956 petitioner was dismissed from service for deserting his crew (R.145). He was held out of service by respondent until petitioner's labor organization, the Brotherhood of Railroad Trainmen, interceded for petitioner. It was then agreed that petitioner would be *reinstated* to his job, *with seniority rights unimpaired*, but would not receive pay for time lost (R.395-6, 436-8, 454-5). The agreement under which petitioner was reinstated is set forth in a letter from H. C. Wyatt, respondent's Vice Presi-

dent and General Manager, to K. H. Jones, dated November 8, 1957—Plaintiff's Exhibit No. 21 (R.454, 474). When petitioner was reinstated he was not required to file an application for employment, and was not required to, and did not submit to a physical examination (R.419-21, 424). He was, however, required to have his eyes and hearing examined (R.424). The record of this examination was admitted in evidence as Defendant's Exhibit No. 32 (R.420, 510). After petitioner was reinstated to his former employment, his seniority dated from July 24, 1951 (R.436-8). There is no evidence to the contrary.

Although petitioner testified that he was a regular worker and never lost any time from work on account of sickness or disability (R. 263-4, 288), that he worked eight hours a day and "five days every week," and frequently worked "overtime" (R. 193-4), and had no difficulty performing his duties as brakeman from 1951 to January 23, 1958, the date of his alleged injury, it appears from petitioner's work record from July 1951 to February 1958—Defendant's Exhibit No. 29 (R. 375-6, 506)—that during said entire period, petitioner was a very *irregular* worker, and lost many days in nearly every month during said period by reason of sickness, or other unexplained absences from work. In many cases petitioner's work record showed merely that petitioner was "off by permission". Petitioner did not attempt to explain why he lost so much time from work by reason of sickness, or why he was "off by permission" so frequently.

Petitioner had been employed by respondent on two previous occasions. On May 25, 1943, petitioner, having applied to respondent for work as a track laborer, was examined by Dr. J. C. Gordon, respondent's medi-

cal examiner, and was approved for such employment. During this examination Dr. Gordon asked petitioner certain questions pertaining to his health, illnesses, injuries, etc., and filled in petitioner's answers on a card furnished by respondent for that purpose. Defendant's Exhibit No. 8 (R. 257, 491). However, petitioner worked only one day during the first half of June, 1943, and earned $8.80 (R. 352-3). He quit voluntarily.

Then again on September 27, 1948, petitioner applied to respondent for employment as section laborer, and at that time filled out and signed a written Application for Employment—Defendant's Exhibit No. 6 (R. 251, 486). On the same date petitioner was examined by Dr. Roy E. Christie, respondent's medical examiner. Dr. Christie asked petitioner certain questions pertaining to his health, illnesses, injuries, etc., and filled in the answers on a card furnished by respondent for that purpose—Defendant's Exhibit No. 7 (R. 255, 488). Petitioner reported for work on September 29, 1948, at 7:00 o'clock A.M. and worked three hours and voluntarily quit (R. 352-3). Petitioner remembered only *one* previous employment by respondent (R. 221-2).

At the time of petitioner's alleged injuries—January 23, 1958, at 12:30 A.M.—petitioner was employed by respondent as a yard brakeman in respondent's west yard at Bluefield, West Virginia.

Prior to petitioner's alleged injury, he and several of respondent's other employees were engaged in classifying cars—breaking up a train of empties and placing them upon the classification tracks. The west yard of respondent declines toward the west and cars and trains could travel by gravity in a westerly direction.

At the time of petitioner's alleged accident, petitioner and the other brakemen were engaged in breaking up and classifying a train of sixty-nine empty cars. A steam locomotive, on the east end of the train, was shoving the cars. As the train proceeded slowly in a westerly direction, the brakemen, sometimes referred to as car cutters, would cut off one or more cars from the west end of the train, and a brakeman would ride each car, or cut of cars, down to the classification tracks—12 in number— and place same upon the proper tracks. The cars traveled by gravity toward the west. It was not customary, when there was a sufficient number of brakemen to ride the cars to the classification tracks, to stop the train as each car, or cut of cars, was cut off from the train (R. 102, 127-8, 355-6, 392-3, 448). Ordinarily when the car, or cut of cars, was cut off from the train, it would drift on down the track away from the train from which it had been cut off. There were sufficient riders at the time of petitioner's alleged accident, and, therefore, it was not intended that the train would be stopped as each car, or cut of cars, was cut off from the train (R. 355).

As the train of sixty-nine empties moved slowly westward at a speed of approximately three or four miles per hour—the usual and customary speed during such switching operations (R. 101-2, 123-5, 131, 355, 361)—petitioner was directed by the Conductor in charge to get on the car in question and take it to the shop track. Cars needing repairs are placed on the shop track. Petitioner got on the last car on the train and mounted the brake step on the east end of the car, and *applied the brake* (R. 154-5, 159, 161-2, 266-8, 277), and petitioner's car was cut off from the train by another brakeman, and the car drifted down-

grade toward the west and away from the train from which it had been uncoupled (R. 155).

However, for some unknown reason, the train began to overtake the car, and the Conductor observing this, gave the Engineer a signal to stop (R. 356). However, before the Engineer could stop the train, it coupled to the car on which petitioner was riding and petitioner claims that the coupling of the train to the car on which he was riding, threw him against the end of the car and injured him.

After the car in question was cut off to petitioner, it traveled for approximately three or three and a half car lengths before the train overtook it and recoupled to it (R. 162). A car is approximatey forty feet long. Apparenty the distance separating the west end of the train and the car on which petitioner was riding was at no time more than approximately twenty feet (R. 356-61). A witness for the petitioner testified that the car was never more than six feet from the end of the train (R. 102, 105). Another witness for petitioner testified that "the train followed it (the car) and *gradually* caught up with it" (R. 131). Another witness for petitioner said that the train "was moving *slowly* in a westerly direction" (R. 123).

When petitioner's witness, a yard brakeman, saw that the train was overtaking the car on which petitioner was riding, he ran to the car to prevent it from coupling. The coupling apparatus could be operated without going between the cars. However, the yard brakeman did not reach the train in time to prevent it from coupling to the car. It did not occur to the yard brakeman that petitioner was in any danger, but the former knew that if the train coupled to the car,

that the train would have to be stopped in order to uncouple the car, and that this would delay the movement of the train (R. 124-5). To the same effect see the testimony of the conductor (R. 356).

Petitioner's witness, another yard brakeman, testified that he was on the train in question at the time it coupled to petitioner's car; that he was about three or four cars to the west of the car on which petitioner was riding; that the coupling of the train to petitioner's car almost knocked him, the witness, off the car on which he was riding (R. 86). However, he was not thrown from the car and was not injured in any way (R. 91).

It further appeared from the evidence that respondent's rules in effect at the time of petitioner's alleged injury, permitted a train traveling at a speed of four miles per hour to couple to a *standing* car; that this method of coupling was customary and perfectly safe, and that it was not customary for the brakemen to leave the cars during such coupling operations (R. 393, 445-7).

The evidence further showed that whenever a train such as this stops, there is always "slack action"; that this slack action cannot be prevented, and that the brakemen can hear the slack running out in ample time to protect themselves. There is no evidence to the contrary (R. 445, 447).

Although petitioner claims that he was seriously injured on January 23, 1958, as a result of the above mentioned coupling operation, and that he thereby became totally and permanently disabled, he was seen and examined by an orthopedic surgeon on the day following his alleged injury. However, at that exam-

ination petitioner did not complain of his *back*. The only complaint that petitioner made was with reference to pain in his left hip and left thigh. The surgeon stripped petitioner and examined him, but found no bruises, wounds, contusions or lacerations on petitioner's body (R. 428-9, 432). He had x-rays made of petitioner's left hip and left femur. No x-rays were made of petitioner's back, for the reason that he was not complaining of his back at the time. The surgeon did not discover that petitioner had a spondylolisthesis at the time of the above mentioned examination (R. 432).

One of the yard brakemen testifying for petitioner stated that immediately following the alleged accident, petitioner was complaining he had hurt his *hip* and *leg* (R. 121). The written personal injury report made out by petitioner immediately following the alleged accident stated that his left hip and thigh were bruised. No complaint was made of an injury to the back (R. 133-4).

After the institution of this action, petitioner was examined at the request of his attorney, by another orthopedic surgeon, and at that time petitioner advised the surgeon that he had been knocked off of the car and fell down on the coupler, striking his back (R. 53, 63-4). Following the alleged accident, petitioner was also examined by a third orthopedic surgeon, and petitioner admitted he advised the surgeon that he was "knocked * * * completely off of the car" (R. 281-2). As a matter of fact, petitioner was not knocked off of the car. He remained on the car until it stopped and then climbed down off of the car unassisted (R. 357-8). Petitioner testified that he did not learn how the acci-

dent occurred, until he talked with his attorney several months after the accident (R. 274, 289).

Petitioner admitted that he was not knocked unconscious and did not receive a head injury (R. 297), and no witness testified that petitioner was knocked off of the car. The evidence showed clearly that after the car stopped, that petitioner climbed down off of the car unassisted.

2. PETITIONER FRAUDULENTLY OBTAINED EMPLOYMENT WITH RESPONDENT

On July 24, 1951, petitioner, *without assistance,* (R. 371-2) filled out and filed with respondent, his application for employment as a yard brakeman. Defendant's Exhibit No. 4 (R. 225, 480).

This application was filed by petitioner with a clerk in the office of the Terminal Train Master at Bluefield, West Virginia. The Clerk gave petitioner the application form, and, according to respondent's rule and custom, required petitioner to fill out and sign the application. Petitioner neither asked for, nor received assistance in filling out the application (R. 372).

Thereupon petitioner, as directed by the clerk, went to respondent's Division Office at Bluefield, and there was examined by respondent's medical examiner. The medical examiner interrogated petitioner with reference to petitioner's medical history, his physical condition, his past accidents and illnesses, and medical discharge from the military service, and filled out a card containing the questions and petitioner's answers, and the card was signed by petitioner. This card was admitted in evidence as Defendant's Exhibit No. 5 (R. 249, 483). The medical examiner, relying upon the truth of the answers given by petitioner, approved peti-

tioner for employment by respondent as a yard brakeman (R. 413-16).

The medical examiner and other officials of respondent, testified that during petitioner's employment by respondent, and prior to his alleged injury, that they had no reason to believe that he had made false answers in his application for employment, or to the medical examiner (R. 395, 421, 444).

Petitioner's Application for Employment—Defendant's Exhibit No. 4 (R. 225, 480)—which was *filled out* and *signed* by petitioner (R. 371-2), contained the following question and answer:

> "10. Give record of all previous employment in date order (include service with this Company, if any)".

In answer to this question petitioner gave the name of only *one* employer, and stated that he had been employed by such employer from November, 1948, to July, 1951.

The evidence shows without conflict, however, that petitioner had also been employed by five other coal companies (R. 202, 217-20, 487).

The application signed by petitioner—Defendant's Exhibit No. 4 (R. 225, 480)—also contained the following question:

> "11. Give military service and state whether honorably or dishonorably discharged, *or given a medical discharge*".

Petitioner answered this question as follows:

> "U. S. Army. Honorable Discharged".

It is true that petitioner received an Honorable Discharge from the Army, which was admitted in evidence as Defendant's Exhibit No. 3 (R. 213, 477-80). However, on the back of the Honorable Discharge appears the following:

> "40. Reason and authority for separation Certificate of Disability for Discharge. U P Section 1 AR 615-361."

Petitioner admitted, however, (R. 141-2, 212, 229-30, 257-8) that when he was discharged from the Army on January 31, 1946, that he received a CERTIFICATE OF DISABILITY FOR DISCHARGE, and this Certificate was admitted in evidence as Defendant's Exhibit No. 12 (R. 304, 493), and reads in part as follows:

> "7. After careful consideration of all information obtainable and a critical examination, we find this individual unfit for military service because of:
>
> Spondylolisthesis, second-degree, severe, secondary to congenital defects of lumbo sacral junction. Manifested by chronic pain in lower back. Soldier cannot be rehabilitated to perform effective military service. Will be discharged to own care."

As above mentioned, petitioner admitted that when he was released from the Army, that he received a Certificate of Disability for Discharge. We quote from petitioner's testimony:

> "Q. When were you in the Army?
> A. I went to the Army July 18, 1945.
> Q. And when did you get out?

A. I got out January 31, 1946.

Q. What type of discharge did you receive?

A. C. D. D.

Q. What does that mean?

A. It is a certificate of disability for discharge" (R. 141).

"Q. Then, after the Army doctors examined you there, I believe you were given a discharge, weren't you?

A. Yes, sir.

Q. After you got out of Camp Beale?

A. Yes, sir.

Q. After the doctors finished examining you, they gave you a Certificate of Disability for Discharge.

A. Yes, sir." (R. 212-13).

"Q. And what reasons did you give for applying for this pension? Was it the fact that you had a low back disability?

A. It was the fact that I got a Certificate of Disability for Discharge. And people say, you get a *disability discharge*, you get a check or something. * * *. (R. 229-30)

The application in question—Defendant's Exhibit No. 4, R. 225, 480—also contained the following question and answer:

"Q. 14. Have you ever been injured? If so, when and at what place. No."

This answer was false. The evidence clearly shows, and petitioner *admitted*, that he was involved in an automobile accident in 1941 or 1942, in which he injured his side and back, and petitioner testified that this

injury was the cause of his discharge from the Army (R. 141-2, 207-10, 211-13).

Also see Defendant's Exhibit No. 18, (R. 311, 500), entitled ABBREVIATED CLINICAL RECORD, from which we quote:

> "In 1942 pt. had an acute episode of multiple, painful joints, involving wrists, knees, and back. Heart flutter. Since this time has had intermittent back pain, made worse by wet, cold weather. Long periods of standing or walking, or carrying wts. will cause pain. Complete physical examination is negative, except for the following:
>
> *In 1941, in automobile accident, required painful back, had to sleep in special position on abdomen for 3 months because of pain.*" (R. 500)

We quote from the same Exhibit:

> "Patient presents a history of severely painful back which dates back to 1941. Nearly all ranges of back motion are limited and corresponding limitation of activity.
>
> "Working diagnosis or impression: Spondylolisthesis, 2nd degree, severe, secondary to congenital defects of lumbo-sacral junction." (R. 501).

We also quote from said Exhibit under RADIOLOGIC RECORD: (R. 501)

> "The fifth lumbar vertebra is noted farther anterior than its normal position by a distance equivalent to 1/2 of the anterior posterior diameter of the body of the vertebrae, indicative of spondylolisthesis."

This is exactly the same condition that petitioner had following his alleged accident in January of 1958, *and at the trial (R. 56, 62, 235, 239-43, 319).*

The Physical Examination card prepared by respondent's medical examiner on July 24, 1951, when he examined petitioner for employment—Defendant's Exhibit No. 5 (R. 249, 483)—contains the following questions and answers:

> "Have you ever had: * * *
> Rheumatism: No.
> A medical discharge from the Military Service: No. (Honorable).
> Have you ever had a long or serious illness: No.
> What injuries have you ever received: No.
> Have you ever had Tumor, Ulcer, Physical Defect, or been operated upon? No."

All of the foregoing answers were false. Petitioner admitted that prior to his employment by respondent, that he had had a very severe attack of rheumatism which confined him to his bed for many months, and was involved in an automobile accident in 1941 or 1942, and that the rheumatism and personal injuries were the cause of his medical discharge from the United States Army (R. 208-9, 211-13, 214, 215, 259, 281).

Also see Defendant's Exhibit No. 18 (R. 311, 500-2), ABBREVIATED CLINICAL RECORD, which reads in part as follows: (R. 501)

> "History of present illness: Patient states his back first bothered him in the summer of 1942. States he was bedfast for three or four months, his complaint was diagnosed as rheumatism, he contends it was in all of his joints. Since that time

his back has given him trouble. Patient states that long walks or long standing gives him constant and severe pain. His back has always given him some pain on sentry."

We also call the Court's attention to Defendant's Exhibit No. 20 (R. 313, 503), CONSULTATION REPORT, from which we quote:

"History: In 1941 this veteran had inflammatory rheumatism involving multiple joints over the body. He was confined at that time for four months and following recovery from this condition, he first complained of pain and weakness in the lower back. Some time later he was in an automobile accident and injured the ribs on the right. He was inducted in July 1945 and was given a medical discharge in January 1946, having spent about one month of this time in the hospital because of his complaint of pain and weakness in the lower spine and in the right rib cage."

The answer to the effect that petitioner had not received a medical discharge from the military service was likewise false, as it is entirely clear that petitioner did receive such medical discharge, and *knew* that he had received it. See Defendant's Exhibit No. 12 (R. 304, 493) CERTIFICATE OF DISABILITY FOR DISCHARGE, and petitioner's testimony (R. 141-2, 212-13, 229-30).

We also call attention to Defendant's Exhibit No. 13 (R. 305-6, 495) entitled VETERANS APPLICATION FOR PENSION OR COMPENSATION, which reads in part as follows:

"3. Nature of disease or injury on account of which claim is made and date each began.

> Heart flutters, rheumatism in my back and where my bones join together (last part of 1942), pains in my right side, come from where I had my ribs broken (last of 1941), has got bad since I have been in the Army."

It is clear from this Application that petitioner was claiming a pension for disability due to rheumatism since 1942, and personal injuries sustained in 1941.

Pursuant to the Veterans Application for Pension or Compensation filed by petitioner, the Veterans Administration, on March 21, 1946, wrote petitioner that he had been awarded a pension for disability resulting from spondylolisthesis incurred or aggravated during his World War II Service. See Defendant's Exhibit No. 16 (R. 309, 498). Petitioner did not deny that he *received* and *understood* this letter, and admits that he received the pension. Later, on July 20, 1948, this pension was discontinued for the reason that there had been no "superimposed injury" on petitioner's "congenital defect during service," and "that in the absence of superimposed injury or active pathology, service connection by way of aggravation may not be granted for such developmental abnormality." See Defendant's Exhibit No. 17, R. 310, 499.

The answer appearing in Defendant's Exhibit No. 5 (R. 249, 483) to the effect that petitioner had never had a "physical defect" was likewise false, as it was clearly shown that petitioner had a severe spondylolisthesis since prior to his induction into the Army in 1945.

Respondent's medical examiner testified that if, when he examined petitioner in July of 1951, petitioner had told him the truth concerning his spondylolisthesis, his

previous accident, illnesses and disabilities, and his Army service and medical discharge, he would not have approved petitioner for employment as a yard brakeman (R. 413-16), and that petitioner would not have been employed (R. 422).

Numerous other doctors who testified in the case said that if petitioner had spondylolisthesis in 1945 and 1946, as indicated in the Army and Veterans Administration records, hereinbefore referred to, that they would not have approved him for employment as a yard brakeman, as the duties of a yard brakeman are very strenuous, and a person with a severe spondylolisthesis is easily injured (R. 65, 238-41, 320-1). An orthopedic surgeon on cross-examination by respondent's attorney testified:

> "In pre-employment x-ray study, if I saw a condition that looked like this (x-ray of petitioner's low back), I would advise against that man working as a brakeman, because there is too much possibility of him getting a symptomatic one *even in the ordinary activities of braking, not with any accident at all*" (R. 65).

The testimony of these doctors is not denied, and it is quite certain that if in July 1951 respondent's medical examiner had known the true facts concerning petitioner's physical condition and past medical history, that he would not have approved petitioner's employment.

At the trial of this case petitioner contended that his spondylolisthesis was readily discoverable on medical examination and that if respondent's medical examiner did not discover his condition, that he should have done so. The same contention is made in peti-

tioner's brief. However, the medical examiner testified that he gave petitioner a "screening examination" (R. 410, 423), and that he did not discover petitioner's condition. It also appears that petitioner had taken, and *passed*, numerous physical examinations, prior to his examination by the medical examiner, and apparently none of the examining physicians discovered petitioner's condition.

Petitioner was examined before induction in the Army (R. 203). He was also examined as mentioned above by an orthopedic surgeon the day following his alleged injury, but the surgeon did not discover his spondylolisthesis (R. 432). Petitioner also passed physical examinations for employment by six coal companies (R. 142-5, 202, 217-20, 487), and, according to his testimony, petitioner actually performed heavy work for all but one of these companies. Petitioner was employed by respondent in 1943 and 1948, but on neither of these occasions did the examining physician discover that petitioner had spondylolisthesis.

Therefore, it is understandable why respondent's medical examiner in 1951 did not discover petitioner's true condition, particularly in view of the false answers in petitioner's Application for Employment, and the false answers given to the medical examiner.

Before petitioner was employed by defendant in 1943, he was examined by one of respondent's medical examiners, and the record of this examination was offered in evidence as Defendant's Exhibit No. 8 (R. 257, 491). In this examination petitioner denied that he had ever received an injury, although, as shown above, he had been involved in an automobile accident *a year or two* prior to this examination, and was complaining of this injury while in the Army in 1945 and

in 1946. In fact, petitioner testified that this injury caused his discharge from the Army (R. 211-12, 214). Petitioner also denied to the medical examiner that he had ever had rheumatism. However, as above shown, petitioner admitted at the trial that he had suffered with rheumatism for several years, and his Army records, and the Veterans Administration records offered in evidence, showed clearly that petitioner had been afflicted with disabling rheumatism.

Petitioner also denied in this examination that he had ever had a physical defect, although it is an admitted fact that he did have a very severe spondylolisthesis. Petitioner did not deny that he gave such false answers to respondent's medical examiner in 1943. However, he said he did not *remember* being examined by him (R. 256-7).

In order to obtain employment with respondent in 1948, petitioner was required to fill out and sign a written application, which was introduced in evidence as Defendant's Exhibit No. 6 (R. 251, 486). In this Application the following question was asked:

> "9. Give record of all previous employment in date order (include military service, if any)".

In reply to this question petitioner stated that he had been employed by two coal companies, *but did not disclose that he had been in the Army in 1945 and 1946*, and did not disclose that he had been given a *medical discharge* from the Army on account of a severe spondylolisthesis, and had received a pension from this condition for many years. He also failed to give the names of many former employers. In particular, he failed to state that he had been employed by a fuel company for about one month, but had quit work "be-

cause of physical disability". Defendant's Exhibit No. 19 (R. 312, 502-3).

In answer to question 10 in the 1948 Application, petitioner also denied that he had ever been injured. In fact, he denied it three times (R. 487). We quote question 10, and petitioner's answers:

> "10. Have you ever been injured? If so, when and at what place: *None;* How did it occur: *None;* Extent of injuries?: *None.*"

We have heretofore shown that petitioner had been injured in an automobile accident in 1941, and that these answers were, therefore, completely false.

Before being accepted for employment by respondent in 1948, petitioner was also required to submit to a physical examination by one of respondent's medical examiners, who examined petitioner and asked him numerous questions concerning his past medical history, and filled out a Physical Examination card, which was introduced in evidence as Defendant's Exhibit No. 7 (R. 255, 488). In this examination—according to the card—petitioner denied that he had ever been injured, or that he had ever had a "physical defect". All of these answers were completely false, as above shown. Petitioner admitted (R. 250-2) that he *filled out*, and signed the Application for Employment in 1948, although he said that he did not *remember* making the Application for Employment, and did not remember being examined for employment on September 27, 1948, or May 25, 1943 (R. 250, 254).

The three last mentioned exhibits were offered by respondent for the purpose of supporting respondent's contention that petitioner's employment by respondent

in 1951 was procured by false and fraudulent representations, and that the same false and fraudulent representations were made by petitioner to two other of respondent's medical examiners in order to secure employment with respondent in 1948, and in 1943.

Although petitioner's Application for Employment dated July 24, 1951, Defendant's Exhibit No. 4 (R. 225, 480)—answer to question 10—showed that petitioner was employed by a coal company from November 1948 to July 1951, and petitioner testified that he had no difficulty whatever in performing work for the various coal companies which had employed him (R. 144), it appears that on December 11, 1950, about seven months prior to petitioner's employment by respondent, that petitioner filed with the Veterans Administration an Application for Hospital Treatment or Domiciliary Care—Defendant's Exhibit No. 14 (R. 308, 496). We quote from this Application (R. 497):

> "39. Brief History. In 1945 had trouble with back after maneuvers. Was given a brace by Army doctors to aid back trouble.
>
> 40. Symptoms. Severe (pain) in lower back region which totally disables patient for time being. Causes tremendous discomfort."

However, the Veterans Administration, on December 15, 1950, wrote petitioner as follows:

> "Your application for hospital care has been received and we regret to advise that the medical findings fail to show definite need of hospital treatment or domiciliary care." Defendant's Exhibit No. 15 (R. 308-9, 497).

It is true that petitioner testified that when he was examined by respondent's medical examiner on July 24, 1951, that this medical examiner did not ask him any questions. However, petitioner also testified on numerous occasions that he did not *remember* what he said to the medical examiner, or what the medical examiner said to him during this examination (R. 222-4, 246-9). The trial of this case took place approximately *eight years* following petitioner's examination in 1951 by the medical examiner, and, aside from the improbability that petitioner would remember the conversation with the medical examiner, petitioner repeatedly admitted that he had a very poor memory (R. 221-2, 228-9, 231-2, 250, 252, 254, 260-1). In fact, on one occasion petitioner testified "I can't hardly remember 1958". (R. 229) On another occasion when petitioner was having difficulty in remembering, he said "I guess I'll have to deny that because I don't remember" (R. 232).

Petitioner's poor memory was also demonstrated by his testimony to the effect that he did not remember whether he was *examined* when he was employed by respondent in 1943, and in 1948 (R. 222, 250), whether he was involved in an automobile accident in 1941, he being fifteen years of age at the time (R. 227-8), whether he was attempting to get in a Veterans hospital during the years 1948, 1949 or 1950 (R. 232), whether he was examined by a physician for the Veterans Administration in November of 1947 (R. 229). Although petitioner admitted that he had been examined by numerous doctors prior to July 1951, his recollection pertaining to these examinations was extremely hazy, and he remembered nothing whatever that was done or said during either or any of said examinations.

Petitioner advised his own physician, on May 15, 1959, that during his entire life he had had no previous difficulty with his back (R. 53, 63). Petitioner advised another physician selected by him a short time prior to the trial of this case, that he had had no previous back disability (R. 82).

Petitioner was examined by a neurosurgeon of the University of Virginia Hospital, at Charlottesville, Virginia, on August 19, 1959, and on that occasion petitioner advised the surgeon that prior to January 23, 1958, he "had never had any trouble with his back or his leg" (R. 234). A short time after petitioner's alleged injury, he went to Baltimore, Maryland, and was examined by an orthopedic surgeon. We quote from a letter dated June 17, 1958, from this surgeon to an attorney then representing petitioner:

> "According to (petitioner's) history, he was the epitome of health prior to his injury. He states that he was able to bend, twist, turn, do back flips and lift a couple of hundred pounds; *he had no previous difficulty of any kind with his back.*" (R. 456-7).

Subsequent to his alleged injury of January 23, 1958, petitioner was also examined by an orthopedic surgeon of Roanoke, Virginia, and on that occasion petitioner stated he had had no previous difficulty with his back (R. 321-3).

On November 4, 1947, a physician examined petitioner for the Veterans Administration, for the purpose of determining whether petitioner should be admitted to a Veterans hospital. At that time petitioner was complaining of "low back disability" and other ailments (R. 299). However, petitioner, at the trial,

refused to admit that he had been examined by this physician in November, 1947, or at any other time.

Petitioner not only misrepresented his previous back condition to every doctor who examined him, but misrepresented such condition to his own attorney, as will appear from the transcript of the pre-trial proceedings in this case (R. 42-3), from which we quote:

> "Mr. Sanders, Sr.: Well, let me ask you a question. Do you claim he never had been previously injured in the back?
>
> Mr. Walter G. Burton: I sure do.
>
> Mr. Sanders, Sr.: You claim that?
>
> Mr. Walter G. Burton: I claim that he had never been to a doctor, that he worked in the coal mines, about his back; that he could go up these ladders with his arms and without using his legs or his back, that he could go up them, he was that strong. He could go up those ladders with his arms.
>
> Mr. Sanders, Sr.: You claim he never had any previous back injuries or previous back disabilities?
>
> Mr. Walter G. Burton: *That's right; and had never been to any physician about those matters.*"

In explaining why he did not advise his own attorney as to his previous back condition, petitioner said "my back wasn't hurting me". (R. 280).

Petitioner not only misrepresented his physical condition to all the doctors who examined him, and to his own attorney, but actually carried his misrepresentations into the court room, and testified repeatedly that prior to his alleged injury of January 23, 1958, his back had never given him any pain or discomfort (R. 196, 292-3).

SUMMARY OF ARGUMENT

Petitioner had received a medical discharge from the United States Army in 1946, for a severe, second-degree spondylolisthesis which disabled him from performing effective military service, and had received a pension for his disability for over two years. This spondylolisthesis was aggravated by seriously disabling rheumatism and a personal injury. Shortly after his discharge from the Army, petitioner had quit work for Pocahontas Fuel Company on account of physical disability. On December 11, 1950—seven months before applying to respondent for work as a yard brakeman—petitioner had applied to the Veterans Administration for hospital treatment, or domiciliary care, on account of his low back disability.

Petitioner knew all of the foregoing facts on July 24, 1951, when he applied to respondent for work as a yard brakeman, but willfully and intentionally concealed these facts for the purpose of deceiving respondent and securing employment.

In October, 1956, petitioner was dismissed from service for deserting his crew. He was held out of service by respondent until petitioner's labor organization, the Brotherhood of Railroad Trainmen, interceded for petitioner. It was then agreed that petitioner would be reinstated to his job, with seniority rights unimpaired, but would not receive pay for time lost. When petitioner was reinstated, he was not required to file an application for employment, and was not required to, and did not submit to a physical examination. He was, however, required to have his eyes and hearing examined. After petitioner was reinstated to his former employment, his seniority dated from July 24, 1951.

According to the testimony of four doctors who examined petitioner following his alleged injury of January 23, 1958, a person with a severe spondylolisthesis such as petitioner had, is physically unfit for employment as a yard brakeman, and no medical examiner would have been justified in approving him for such employment had he known of such condition. There is no evidence to the contrary.

Relying upon the statements made by petitioner in his written application for employment, and to respondent's medical examiner, and the examination made by its medical examiner, and having no reason to believe that the statements were false, respondent employed petitioner as a yard brakeman. However, had respondent known the true facts, it would not have employed petitioner. Respondent did not discover the falsity of said representations until after the institution of this action.

Petitioner was examined before induction into the Army. He was also examined by an orthopedic surgeon on the day following the alleged accident, but the surgeon did not discover his spondylolisthesis. Petitioner, prior to his employment by respondent, also passed physical examinations for employment by six coal companies. Petitioner was also examined by respondent's medical examiner in 1943 and 1948, prior to his employment on those dates by respondent. Apparently his spondylolisthesis was not discovered by any of these doctors. Therefore, it is understandable why respondent's medical examiner, in examining petitioner on July 24, 1951, did not discover his spondylolisthesis, particularly in view of the false answers in petitioner's Application for Employment and the false answers given to respondent's medical examiner.

Petitioner's work record from July 1951 to January 1958 indicates clearly that petitioner was disabled from work several days in nearly every month in said period, which corroborates respondent's contention that petitioner was physically unfit for work as a yard brakeman.

There was a direct causal connection between petitioner's alleged injury and said false representations. If petitioner was injured, the only injury he received was an *aggravation* of a pre-existing spondylolisthesis. Had he not had this spondylolisthesis, the condition could not have been aggravated, and there would have been no injury.

Petitioner's fraudulent conduct is established beyond all reasonable doubt. Not only did petitioner conceal his prior physical condition and his medical discharge from the Army from Dr. Troup, respondent's medical examiner, but he deliberately concealed these facts from his own attending physicians, and his own attorney, and despite the positive proof to the contrary, testified repeatedly that prior to the alleged accident of January 23, 1958, he had never had any back disability. Having obtained employment with respondent by fraud, petitioner is not entitled to maintain this action.

ARGUMENT

1. PETITIONER FRAUDULENTLY OBTAINED EMPLOYMENT WITH RESPONDENT

(a) Petitioner Was Not Physically Fit For Work As a Yard Brakeman. No Medical Examiner Would Have Been Justified In Approving Petitioner For Such Employment.

Due to the strenuous nature of a yard brakeman's work, the physical qualifications of such work were considered by respondent to be the highest of any of its employees (R. 405).

The evidence showed clearly and conclusively that on January 31, 1946, petitioner was discharged from the United States Army for the reason that he had a severe, second-degree, spondylolisthesis, manifested by chronic pain in the lower back, and that he could not be rehabilitated to perform effective military service. See petitioner's Certificate of Disability for Discharge, Defendant's Exhibit No. 12 (R. 304, 493).

For confirmation of the diagnosis made by the Army doctors when petitioner was given a disability discharge, see

Defendant's Exhibit No. 13 (R. 305-6, 495)
Defendant's Exhibit No. 14 (R. 308, 496)
Defendant's Exhibit No. 17 (R. 310, 499)
Defendant's Exhibit No. 18 (R. 311, 500)
Defendant's Exhibit No. 19 (R. 312, 502)
Defendant's Exhibit No. 20 (R. 313, 503)
Defendant's Exhibit No. 23 (R. 314-15, 505)

Some of these exhibits show that since 1941 petitioner has suffered with seriously disabling rheumatism, and a seriously disabling personal injury. See:

Defendant's Exhibit No. 13 (R. 305-6, 495)
Defendant's Exhibit No. 18 (R. 311, 500)
Defendant's Exhibit No. 20 (R. 313, 503)

We have heretofore quoted extensively from the above mentioned exhibits.

Four doctors, including one called by petitioner, testified in substance that a person with a severe spondylolisthesis such as petitioner had was unfit for employment as a yard brakeman, and that a medical examiner would not be justified in approving petitioner for such employment (R. 65, 238-41, 320-1, 413-16). There was no evidence to the contrary.

We quote from the testimony of one of petitioner's physicians:

> "A. No. In pre-employment X-ray study, if I saw a condition that looked like this, I would advise against that man working as a brakeman because there is too much possibility of him getting a symptomatic one even in the ordinary activities of braking, not with any accident at all" (R. 65).

It, therefore, clearly appears that petitioner, on July 4, 1951, was physically unfit for work as a yard brakeman, and that no medical examiner would have been justified in approving him for such employment.

(b) Petitioner Knew That He Had Received a Medical Discharge From the Army, For Spondylolisthesis; and Knew That He Had Been Seriously Disabled With Rheumatism and by a Personal Injury.

Petitioner was inducted into the United States Army on July 18, 1945, and was discharged on January 31, 1946. He received a Certificate of Disability for Discharge, which is commonly known as a disability or medical discharge. This much is entirely clear. Defendant's Exhibit No. 12 (R. 304, 493).

It is equally clear that petitioner *knew* on July 24, 1951, when he applied for employment with respondent, and was examined by respondent's medical examiner, that he had received a medical discharge. We quote from petitioner's testimony:

> "Q. 8. When were you in the Army?
> A. I went to the Army July 18, 1945.
> Q. 9. And when did you get out?
> A. I got out January 31st, 1946.
> Q. 10. What type of discharge did you receive?
> A. C.D.D.
> Q. 11. What does that mean?
> A. It's a Certificate of Disability for Discharge (R. 141).
> Q. 186. After the doctors finished examining you, they gave you a Certificate of Disability for Discharge, didn't they?
> A. Yes, sir." (R. 212-13)
> "Q. 370. And what reasons did you give for applying for this pension? Was it the fact that you had a low back disability?
> A. It was the fact that I got a Certificate of Disability for Discharge. And people say, you get a *disability discharge*, you get a check, or something. They tell me about it in the Army. I don't know." (R. 229-30)

It also appears that on March 29, 1948, petitioner was examined by a Veterans Administration physician and that he gave the examiner the following history: Defendant's Exhibit No. 20 (R. 313, 503)

> "History: In 1941 this veteran had inflammatory rheumatism involving multiple joints over the body. He was confined at that time for four

> months and following recovery from this condition, he first complained of pain and weakness in the lower back. Some time later he was in an automobile accident and injured the ribs on the right. He was inducted in July 1945 and was given a *medical discharge* in January 1946, having spent about one month of this time in the hospital because of his complaint of pain and weakness in the lower spine and in the right rib cage." (R. 503)

Therefore, it is quite clear from the above mentioned exhibits, and petitioner's testimony, that when he was examined by respondent's medical examiner on July 24, 1951, petitioner *knew* that he had served approximately six months in the Army and had received a medical discharge; and knew exactly why he had received this medical discharge. He also knew that he had suffered for many years with disabling rheumatism, and a disabling personal injury. It is inconceivable that petitioner did not know, and have in mind, all of the foregoing facts when he applied to respondent for employment on July 24, 1951.

(c) Petitioner Fraudulently Concealed From Respondent His Past Military Service and Medical Discharge; That He Had Been Seriously Disabled With a Spondylolisthesis, Rheumatism, and a Personal Injury; That He Had Twice Been Convicted of Maiming; That He Had Previously Been Employed By Numerous Coal Companies, and Had Quit Working For One of Said Companies by Reason of a Physical Disability.

On July 24, 1951, petitioner, *without assistance* (R. 371-2, 224-6) filled out and signed an application for employment as a yard brakeman. Defendant's Exhibit No. 4 (R. 225, 480). According to this Application, petitioner had been through grade school, and two years of high school. He had attended vocational

school for training as an automobile mechanic for a period of twenty months (R. 200-1). Petitioner neither asked for, nor received any assistance whatever in filling out this Application (R. 371-2).

Question 10 of said Application reads in part as follows:

> "10. Give record of all previous employment in date order (include service with this Company, if any)".

In answer to this question petitioner gave the name of only one employer—the last one by whom he had been employed (R. 226-7). However, petitioner admitted that he had previously been employed by five other concerns (R. 142, 202, 216, 217-18, 219, 220), and by respondent in 1943 and in 1948.

Question No. 10, with reference to petitioner's *previous* employment, and *prior* service with respondent, was perfectly clear and easily understood. There is no contention that petitioner could not read and understand the English language. Question 10 required petitioner to "Give record of all previous employment in date order". It did not ask for the name of petitioner's *last* employer, and petitioner did not so understand the question.

This is shown conclusively by petitioner's answer to an identical question in petitioner's Application for Employment with respondent dated September 27, 1948—Defendant's Exhibit No. 6 (R. 251, 487).

Question 9 in the 1948 Application reads in part as follows:

> "9. Give record of all previous employment in date order * * *".

In his answer to this question, petitioner gave the names of *two* former employers. This shows conclusively that petitioner, in answering question 10 in the 1951 Application, did *not* understand that the answer referred to his *last* employment.

Furthermore, in the 1948 Application, petitioner deliberately concealed the fact that he had been employed by numerous other coal companies, one of which was Pocahontas Fuel Company. Petitioner had ceased working for Pocahontas Fuel Company on account of a "physical disability". Defendant's Exhibit No. 19 (R. 312, 503). Question 10 in the 1951 Application (R. 481) required petitioner to state "Reason for Leaving" previous employment. It is rather obvious why petitioner failed to mention his employment with Pocahontas Fuel Company, and the reason for leaving such employment.

The Application signed by petitioner—Defendant's Exhibit No. 4 (R. 225, 480)—also contained the following question:

> "11. Give military service and state whether honorably or dishonorably discharged, *or given a medical discharge.*"

Petitioner answered this question as follows:

> "U. S. Army. Honorable Discharged."

Having filled in, unassisted, all of the answers to the questions contained in the Application, petitioner necessarily *read* the words "or given a medical discharge". Petitioner did not testify that he did not read and understand the words "or given a medical discharge", and he did not testify that he did not understand what

a "medical discharge" was. To the contrary, petitioner *knew*, as has been shown, that he had received a medical discharge from the Army (R. 141-2, 211-13, 207-10, 229-30). As to this there is not the slightest doubt.

Petitioner knew, of course, that if he had informed respondent he had received a medical discharge from the Army, that his application for employment would not have been approved. Therefore, petitioner told a *half* truth and answered "U. S. Army; Honorable Discharged".

The fact that petitioner, in his 1951 Application for Employment, willfully and intentionally concealed his medical discharge, is strongly corroborated by the fact that petitioner in his 1948 Application for Employment with respondent, also deliberately concealed his prior military service (R. 252-3). Also see Defendant's Exhibit No. 6 (R. 251, 486-7), Question 9 and answer.

The only reasonable conclusion that can be drawn from petitioner's conduct and his testimony is that he willfully and intentionally concealed his prior military service for the purpose of deceiving respondent and securing employment.

Question 14 of petitioner's 1951 Application for Employment with respondent—Defendant's Exhibit No. 4 (R. 225, 480)—and the answer thereto, reads as follows:

> **"14. Have you ever been injured? If so, when and at what place. No."**

This answer was false.

Petitioner was admittedly injured in 1941, and he testified repeatedly that this injury was the cause of

his discharge from the Army in January, 1946 (R. 141-2, 207-9, 211-12, 253).

Question 18 of the 1951 Application for Employment—Defendant's Exhibit No. 4 (R. 225, 480)—and the answer thereto, read as follows:

> "18. Have you ever been convicted of a crime?: No. * * *".

This answer was false. Petitioner admitted (R. 244-5) that upon the advice of his lawyer, that he had twice pleaded guilty to "maiming".

It is significant that the answers appearing in the 1951 Application for Employment—Defendant's Exhibit No. 4 (R. 225, 480)—are substantially the same as the answers appearing in the Physical Examination card prepared by respondent's examining physician—Defendant's Exhibit No. 5 (R. 249, 483). For instance, question 11 in the 1951 Application, and the answer thereto, are as follows:

> "Give military service and state whether honorably or dishonorably discharged, or given a medical discharge: U. S. Army; honorable discharged." (R. 481)

In the Physical Examination card the question and answer read as follows: (R. 484)

> "Have you ever had:
> A medical discharge from the military service? No. (Honorable) (R. 484).

Isn't it apparent that both of these answers came from petitioner?

Question 14 in the 1951 Application for Employment, and the answer thereto, read as follows:

> "Have you ever been injured? If so, when and at what place: No." (R. 481-2)

In the Physical Examination card prepared by respondent's medical examiner, the question and answer pertaining to personal injury, are as follows:

> "What injuries have you ever received? No." (R. 484)

There can be no doubt that petitioner falsely answered this question in his Application, as it appears without the slightest conflict that he filled out the Application himself, without any assistance whatever. Having falsely answered the question in his Application, it is only natural that he would have given Dr. Troup the same false answer.

In his answer to question 10 in the 1951 Application for Employment (R. 481), petitioner concealed his former employment by respondent. He likewise concealed such former employment from respondent's medical examiner.

"If Former Employe, where employed? No Previous Employment" (R. 484).

Therefore, it appears that the material answers appearing in the Physical Examination card prepared by respondent's medical examiner, are substantially the same answers appearing in the 1951 Application for Employment which was filled out by petitioner.

(d) If Respondents' Medical Examiner Had Known the Truth Concerning Petitioner's Military Service and Medical Discharge; and His Severe Spondylolisthesis, Rheumatism, and Personal Injury, He Would Not Have Approved Petitioner for Employment in 1951.

It would be preposterous to assume that respondent's medical examiner would have approved petitioner for employment by respondent as a yard brakeman in 1951, or that petitioner would have been so employed, if petitioner had truthfully answered the questions in his Application for Employment, and had made truthful answers to the medical examiner. The medical examiner testified that after he examined petitioner, he believed petitioner was in physical condition to properly discharge the duties of a yard brakeman (R. 416). He further testified that if, when he examined petitioner in July, 1951, petitioner had told him the truth concerning his spondylolisthesis, his previous accident, his illnesses and disabilities, and his Army service and medical discharge, that he would not have approved petitioner for employment as a yard brakeman (R. 413-16), and that petitioner would not have been so employed (R. 421-2). The medical examiner's testimony that he would not have approved petitioner for employment is uncontradicted.

Numerous other doctors testified that if petitioner had spondylolisthesis in 1945 and 1946, as indicated in the Army and Veterans Administration records, hereinbefore referred to, that they would not have approved him for employment as a yard brakeman, as the duties of a yard brakeman are very strenuous, and a spondylolisthesis is easily aggravated and can become completely disabling. (R. 65, 238-41, 320-1).

(e) Respondent Was Justified In Relying On Petitioner's Representations. It Exercised Reasonable Care In Examining Petitioner.

Petitioner repeatedly asserts in his brief that respondent, in employing petitioner, did not rely on the representations made by petitioner in his 1951 Application for Employment, and his statements to respondent's medical examiner. Petitioner contends that he was dismissed from service in October, 1956, and "rehired" in November, 1957, and that he was not given a physical examination when he was "rehired". As the record shows, petitioner was not "rehired" but "reinstated" and on reinstatement given only vision, hearing and color perception tests (R. 419-21, 424, 474). There was no other examination.

After petitioner was reinstated to his former job, his seniority dated from July 24, 1951 (R. 436-8).

Petitioner contends the fact that respondent physically examined petitioner, indicated that it did not rely on the false answers contained in the Application for Employment, or to respondent's medical examiner. It might just as well be argued that when a life insurance company physically examines an applicant for insurance, that it thereby indicates that it will not rely upon the answers contained in the written application for insurance.

In some cases life insurance companies will issue policies without a physical examination. However, we have never heard of any life insurance company issuing a policy of insurance without a written application. The written application is important to an insurance company, just as it is to an employer, and it is most illogical to contend that a physical examination, by an insurance company, or an employer, indicates that no

reliance is to be placed on the answers contained in the application. Both are important and serve a very useful purpose. Certainly petitioner's false representations made in his Application for Employment and to respondent's medical examiner, cannot be brushed aside by reason of the fact that petitioner was physically examined.

On page 29 of petitioner's brief, footnote 14, reference is made to "Article 17(c) of Rates of Pay and Regulations, Norfolk & Western Ry. Co." requiring that applications for employment must be accepted or rejected within thirty days. As stated in the footnote, this provision of the agreement between respondent and the Brotherhood of Railroad Trainmen was not introduced in evidence. This being true, we wonder why the provision was referred to by petitioner. Certainly the Court will not consider, or be influenced by, matters not in evidence.

The Brotherhood of Railroad Trainmen has likewise attempted to inject into the case the above mentioned provision, and has asked leave to file a brief *amicus curiae* for the purpose of discussing the provision in question. Respondent has objected to the filing of this brief.

We will not discuss the alleged regulation requiring applications for employment to be accepted or rejected within thirty days, as this provision is not in evidence and we assume that it will not be considered by the Court.

As heretofore shown, petitioner filled out, *unassisted*, and signed, his Application for Employment—Defendant's Exhibit No. 4 (R. 225, 480)—and presented it to respondent's medical examiner. The Application

stated, among other things, that petitioner had attended high school for two years; that he had been honorably discharged from the Army; that he had worked for a coal company as a mine brakeman from November, 1948, to July, 1951; that he had never been injured; that his health was good; that he had never been convicted of a crime.

Nothing in the application indicated petitioner was not physically fit and would not make a good employee. Having been honorably discharged from the Army, it necessarily followed that petitioner had passed a physical examination before going into the Army, and of course respondent's examining physician knew this. The fact that petitioner had been employed by the coal company as a mine brakeman for three years was in itself a rather good recommendation.

There was nothing whatever on the Application to indicate that petitioner was not physically fit, or to excite the medical examiner's suspicions.

During his physical examination in 1951, petitioner gave the medical examiner essentially the same information appearing in the Application. See Defendant's Exhibit No. 5 (R. 249, 483). In the Physical Examination card, it appears that petitioner expressly denied having received a *medical discharge* from the Army. Nothing occurred during the Physical Examination, or in the answers given by petitioner to the medical examiner, indicating that petitioner was not physically fit, unless, as petitioner contends, the medical examiner should have discovered petitioner's spondylolisthesis.

The fact that petitioner had necessarily been examined before going into the Army, and had an honorable discharge from the Army, but not a medical discharge,

and had worked for a coal company for three years as a mine brakeman, would in and of itself indicate that petitioner was physically fit. Add to this the fact that petitioner had never been injured, had never been convicted of a crime, had never suffered from a long or serious illness, or any of the other diseases or disabilities referred to on the Physical Examination card—Defendant's Exhibit No. 5 (R. 249, 483)—and we have a picture of a physically fit person and a desirable employee.

However, petitioner contends that the medical examiner was negligent in not discovering petitioner's spondylolisthesis. We submit that the evidence does not justify this charge.

In view of the fact that an Army doctor, six coal company doctors, two other medical examiners for respondent, and an orthopedic surgeon for petitioner, failed to discover petitioner's spondylolisthesis, it is understandable why respondent's medical examiner in 1951 failed to discover this condition, particularly in view of petitioner's misrepresentations.

Under these circumstances we submit that respondent's medical examiner was not required to make an independent investigation to determine whether petitioner was telling the truth. He was justified in relying upon petitioner's representations, and it is clear beyond doubt that he exercised reasonable care and prudence in examining, and approving petitioner for employment, and that was all that was required of him.

(f) There Was a Direct Causal Connection Between Petitioner's False Representations and His Alleged Injuries.

The evidence is clear that when petitioner was employed by respondent on July 24, 1951, he had a severe second-degree spondylolisthesis, and that he had received a medical discharge from the Army for this condition, and a pension for approximately two years.

We quote from Defendant's Exhibit No. 18 (R. 311, 500, 501):

> "RADIOLOGIC RECORD
>
> The 5th lumbar vertebrae is noted farther anterior than its normal position by a distance equivalent to 1/2 of the anterior posterior diameter of the body of the vertebra indicative of spondylolisthesis."

A neurological surgeon, who was head of the Department of Neurosurgery at the University of Virginia Hospital, Charlottesville, Virginia, testified (R. 235, 239, 240, 243) that the condition shown in the above mentioned x-ray report was essentially the same condition that petitioner had at the time of the trial. There is no evidence to the contrary.

Therefore, it is apparent that the only injury which petitioner could have sustained in the alleged accident, was an aggravation of his pre-existing spondylolisthesis. For many reasons heretofore pointed out, it is questionable whether petitioner sustained any injury. The train which coupled to the car on which petitioner was riding was traveling at a speed of from three to four miles per hour—the usual and customary speed in switching operations of that kind. The car on which petitioner was riding was gradually overtaken and coupled to by the train. When the train stopped, peti-

tioner climbed down off of the car, unassisted, and shortly thereafter complained of his hip and leg to some of his fellow employees. The following day petitioner was examined by a physician, and he did not then complain of his back (R. 428-9, 432). Therefore, if petitioner was actually injured, the injury must have been slight indeed, and would not have produced any disability, but for the pre-existing spondylolisthesis.

It is, therefore, clear that there was a direct causal connection between petitioner's false representations and his alleged injury. This conclusion is borne out by the testimony of an orthopedic physician testifying for petitioner (R. 65).

> "A. No. In pre-employment X-ray study, if I saw a condition that looked like this, I would advise against that man working as a brakeman because there is too much possibility of him getting a symptomatic *one even in the ordinary activities of braking, not with any accident at all.*"

We submit that the trial court was clearly right when he said (R. 472) "I can't imagine a stronger case of direct causal connection between the misrepresentations and the injuries complained of than we have in this particular case."

2. THE TRIAL COURT PROPERLY PERMITTED RESPONDENT TO FILE ITS SPECIAL PLEA NO. 1. AND ITS AMENDED SPECIAL PLEA NO. 1.

Petitioner objected to the filing of respondent's Special Plea No. 1, and its Amended Special Plea No. 1, on the ground that respondent had previously stipulated that at the time of petitioner's alleged injury, petitioner was respondent's employee, and engaged in

interstate commerce (R. 40-50, 462-5). The Stipulation referred to appears on pages 18 and 19 of the Record. No law or rule of court required said Special Pleas to be filed prior to the trial date. The Court recognized the fact that counsel for respondent entered into the stipulation in question for the purpose of relieving petitioner from proving that petitioner was engaged in interstate commerce, and expressly held that respondent should not be precluded from filing said Special Pleas, by reason of said stipulation. (R. 464)

We submit that the stipulation in question did not have the effect of precluding the defense of fraud asserted in this case. However, if the stipulation did have such effect, then the Court had the right to relieve respondent from such stipulation, in view of the fact that it clearly appeared that respondent did not intend, by such stipulation, to waive the defense of fraud, and petitioner was not prejudiced in any way by the Court's action. *Brast* v. *Winding Gulf Colliery Company*, 94 F.2d 179 (4th Cir. 1938), *Cole* v. *State Compensation Commissioner*, 173 S.E. 263 (W.Va. 1934).

3. THE TRIAL COURT CORRECTLY INTERPRETED THE LAW IN DIRECTING A VERDICT FOR RESPONDENT

The trial court in directing a verdict in favor of respondent, relied principally upon the case of *Minneapolis, St. Paul & S.S.M. Ry. Co.* v. *Rock*, 279 U.S. 410. We submit that the *Rock* case is clearly in point and supports the judgment of the trial court.

The court, in the course of its opinion in the *Rock* case, said:

> "The carriers owe a duty to their patrons as well as to those engaged in the operation of their

railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the act is calculated to stimulate them to proper performance of that duty. Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations. Respondent's physical condition was an adequate cause for the rejection of his application. The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the act.

* * *

"Respondent's position as employee is essential to his right to recover under the act. He in fact performed the work of a switchman for petitioner, but he was not of right its employee, within the meaning of the act. He obtained and held his place through fraudulent means. While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and *physical condition* to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy."

The facts in the *Rock* case, and in the case now under consideration are different, but the principle involved in both cases is exactly the same.

In the *Rock* case the plaintiff perpetrated a fraud on the railway company by having another person impersonate him and in his place to submit to the required examination. In the case now under consideration, petitioner himself submitted to the examination, but in his Application for Employment, and in reply to questions by respondent's medical examiner, he made false answers with reference to his Army service, medical discharge, physical condition, illnesses and accidents. These fraudulent representations deceived respondent and enabled petitioner to secure employment with respondent.

The only difference between the *Rock* case and the case now under consideration is the *type of fraud* perpetrated. In both cases the employees obtained their employment by fraud.

In fact, the case now under consideration is even stronger in favor of the employer than the *Rock* case, in view of the fact that in the *Rock* case there was no connection whatever between the employee's fraudulent conduct and the *accident*, or the employee's *injuries*, whereas in the case now under consideration, there was a direct causal connection between petitioner's fraudulent conduct and his alleged injuries.

The Rock case was followed by *Minneapolis, St. P. & S.S.M. R. Co.* v. *Borum*, 286 U.S. 447. In the *Borum* case, which cited the *Rock* case with approval, the defendant railroad company denied liability for Borum's injury for the reason that Borum misrepresented his age when applying for employment with the defendant.

The evidence disclosed that it was a general practice of men, over the age specified in the rule, when applying for work on the railroads of defendant and other carriers in the Northwest, falsely to represent their ages to be within the specified limit, and that this practice was known to the defendant.

The facts in the Borum case are not at all similar to the facts in the case now under consideration. However, the most important distinction between the Borum case and this case is that in the Borum case there was no causal connection whatever between Borum's false representation with respect to his age, and his injury, whereas in the case now under consideration there was a direct causal connection between petitioner's false representations and his alleged injury.

In the case of *Casso* v. *Pennsylvania Railroad Company*, 219 F.2d 303 (3rd Cir., 1955), the Court held, Syl. 2:

> "One who has procured his employment by fraud may not recover (under Federal Employers' Liability Act) providing the false statement was of such character that it substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition."

In the case of *Southern Pacific Co.* v. *Libbey*, 199 F.2d 341 (9th Cir. 1952), the Court said, page 348:

> "it is not questioned by either side that one who procures his employment by fraud is not entitled to the benefits of the Employers' Liability Act * * * providing the false statement was of such character that it substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition."

In the case of *Ercsafe* v. *New York N. H. & H. R. Co.*, 250 F.2d 619 (2nd Cir., 1957), the Court said, pages 621-622:

> "A humane and realistic policy in such cases requires substantial proof of a direct causal connection between the misrepresentations made at the time of hiring and the subsequent *injury* to the employee, before any defense of fraud can be considered as a bar to a recovery."

In the case of *Talarowski* v. *Pennsylvania R. Co.*, 135 F. Supp. 503 (D.C. Del., 1955), the Court held that an employee is not entitled to maintain an action under the Federal Employers' Liability Act where his employment has been procured by fraudulent statements made in the application for employment, if the statements are relied upon, and are of such a character as to have been a substantial factor in the hiring.

In the case of *Matthews* v. *Atchison T. & S. F. R. Co.*, 129 P. 2d 435 (Cal., 1942), the Court said, page 440:

> "The concealment does not vitiate the contract of employment and prevent recovery, unless there is shown to be a casual connection between the *injury* (not accident) and the misrepresentations in the application for employment."
>
> "Where employee of railroad had obtained employment on misrepresentations, relied on by railroad, employment contract *held* void, precluding recovery for injuries under statute (Federal Employers' Liability Act." Syl. 2)
>
> Fort Worth & D. C. Ry. Co. v. Griffith, 27 S.W. 2d 351 (Tex. 1930).

The case of *White* v. *Thompson*, 312 P. 2d 612 (Kan., 1957), a well considered case, while not in point on

the facts, supports respondent's position that where there is a direct causal connection between the false representations and the injury sustained by the employee, that the employee cannot recover. However, in White v. Thompson it was entirely clear that there was no causal connection between the employee's false representations and his injury.

> "Employee's concealment of vital facts from employer when procuring employment will not vitiate contract of employment and prevent recovery for injuries sustained in such employment *unless there is a causal connection between injury and misstatements.*" Syl. 3.
>
> Phillips v. Southern Pac Co., 58 P.2d 688 (Cal., 1936).

The case of *Clark* v. *Union Pacific*, 211 P. 2d 402 (Idaho, 1949), also supports respondent's position, although in that case the Court held that the question whether the railroad company was deceived by the employee's misrepresentations, was for the jury. In that case the employee testified that he gave to the defendant's medical examiner full information with reference to his physical condition. Petitioner did not so testify.

In *Blanton* v. *Northern Pacific Co.*, 10 N.W. 2d 382 (Minn. 1943), and *Laughter* v. *Powell*, 14 S.E. 2d 826 (N.C., 1941), it was quite clear that there was no causal connection between the alleged false representations and the injuries sustained by the plaintiffs.

In *Payne* v. *Daugherty*, 283 F. 353 (8th Cir., 1922), strongly relied on by petitioner, it does not clearly appear that there was a causal connection between the alleged false representations and the injury sustained

by the plaintiff, and the decision could well be justified on that ground.

Petitioner's brief, page 42, takes the position that before respondent can avoid liability for petitioner's alleged injuries, on the ground of false representations, that it must be shown that there was a direct causal connection between the false representations and the alleged *accident*. We do not so understand the law. Certainly none of the above mentioned cases so hold. It would be most illogical to hold that respondent could not defend on the ground of such false representations, without showing a direct causal connection between the false representations and the *accident*, when it clearly appears that there was a direct causal connection between such false representations and the *injuries* alleged to have been sustained.

Petitioner takes the further position on page 42 of his brief, that even though petitioner did make false representations, and there was a direct causal connection between such false representations and petitioner's alleged injury, that nevertheless petitioner became an employee and is entitled to recover under the F.E.L.A. However, this contention is completely refuted by the cases above cited.

In determining whether this case should have been submitted to the jury, the test seems to be whether the jury could "with reason" have found the issues in favor of petitioner. *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500.

> "Where the evidence is so overwhelming on one side as to leave no room to doubt what the fact is, the court should give a peremptory instruction to the jury."

Gunning v. Cooley, 281 U.S. 90.

> "As to the second category, although the statements concerning directed verdicts are often extremely ambiguous, a verdict will normally be directed where both the facts and the inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, points so strongly in favor of one party or the other that the court feels reasonable men could not possibly come to a contrary conclusion."

Moore's Federal Practice, Volume 5, page 2314.

We respectfully submit that the facts herein, and the inferences to be drawn therefrom, as supported by the overwhelming weight of the evidence, point so strongly in favor of respondent, that reasonable men could not possibly come to a contrary conclusion and that, therefore, the judgment of the trial court should be affirmed.

Respectfully submitted,

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